**Editor's note: Reconsideration granted; affirmed as modified by Order dated March 31, 1987 -- See 90 IBLA 178A th C below; Appealed -- dismissed, No. 385-87-L (Cl. Ct. Nov. 5, 1991) (dismissal was due to Fed. Cir. decision in Chevron USA Inc. v. U.S. 923 F.2d 830)**.

MOBIL OIL EXPLORATION AND
PRODUCING SOUTHEAST, INC.

IBLA 86-63 Decided January 21, 1986

Motion to dismiss appeal from decision by the Director, Minerals Management Service, denying request for gas royalty refunds.

Denied; supplementation of record ordered.

1. Appeals -- Rules of Practice: Appeals: Dismissal -- Rules of Practice: Appeals: Timely Filing

   Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of the notice of appeal is jurisdictional, and failure to file an appeal within the time allowed requires its dismissal.

2. Appeals -- Rules of Practice: Appeals: Dismissal -- Rules of Practice: Appeals: Timely Filing

   An appeal will not be dismissed as untimely if the record transmitted with the appeal fails to establish that the decision from which the appeal is taken was served upon appellant in accordance with 43 CFR 4.401(c) more than 30 days prior to the filing of the notice of appeal.

APPEARANCES: Cass C. Butler, Esq., Office of the Solicitor, Washington, D.C., for the Minerals Management Service; J. Berry St. John, Jr., Esq., New Orleans, Louisiana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On May 30, 1985, the Director, Minerals Management Service (MMS), issued a letter denying eight requests for gas royalty refunds covering payments made prior to the issuance of Federal Power Commission (FPC) Opinion 598. As the successor-in-interest to TransOcean Oil, Inc. (TransOcean), and the Superior Oil Company (Superior), Mobil Oil Exploration and Producing Southeast, Inc. (MOEPSI), filed an appeal from this denial of the royalty refund requests filed by those companies.

[1] On behalf of MMS, the Solicitor has moved to dismiss MOEPSI's appeals as untimely. Departmental regulation 43 CFR 4.411(a) provides that "[a] person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service." Subsection (c) of the regulation provides that no extension of time will be granted for filing the notice of appeal, subject, however to a grace period provided by 43 CFR 4.401(a). 1/ The requirement for timely filing of a notice of appeal is jurisdictional; the Board has no authority to consider an appeal which is filed late. Oscar Mineral Group #3, 87 IBLA 48 (1985).

[2] The 30-day period provided by 43 CFR 4.411, however, does not begin to run until a decision has been served upon the appellant in the manner required by 43 CFR 4.401(c). 2/ Usually, if the case record is complete, adjudication of a motion to dismiss for untimely notice of appeal is purely a mechanical matter. One checks the case file transmitted with the appeal for the document provided by appellant establishing its last address of record to see if the decision was sent to the right place; one then reads the registered or certified mail return receipt cards to determine the date of service and adds 30 days in accordance with 43 CFR 4.22(e) to calculate the date on which the notice of appeal is due. Next, one checks the date stamped on the notice of appeal by the office where it is required to be filed, determines whether it is late, and, if so, whether the grace period provided by 43 CFR 4.401(a) applies.

---

1/ Departmental regulation 43 CFR 4.401(a) provides a delay in filing may be waived if the document is filed no later than 10 days after it was required to be filed and the document was transmitted before the filing deadline.

2/ That regulation provides as follows:

"Service of documents. (1) Wherever the regulations in this subpart require that a copy of a document be served upon a person, service may be made by delivering the copy personally to him or by sending the document by registered or certified mail, return receipt requested, to his address of record in the Bureau.

"(2) In any case service may be proved by an acknowledgment of service signed by the person to be served. Personal service may be proved by a written statement of the person who made such service. Service by registered or certified mail may be proved by a post-office return receipt showing that the document was delivered at the person's record address or showing that the document could not be delivered to such person at his record address because he had moved therefrom without leaving a forwarding address or because delivery was refused at that address or because no such address exists. Proof of service of a copy of a document should be filed in the same office in which the document is filed except that proof of service of a notice of appeal should be filed in the office of the officer to whom the appeal is made, if the proof of service is filed later than the notice of appeal.

"(3) A document will be considered to have been served at the time of personal service, of delivery of a registered or certified letter, or of the return by post office of an undelivered registered or certified letter."

In Sharon Long, 83 IBLA 304 (1984), we held that a motion to dismiss an appeal as untimely will be denied if there is no evidence in the record to show when an appellant who was not served a copy of a decision had actual notice of it. If an appellant has not been served by certified mail, the Board will grant a motion to dismiss an appeal as untimely if the party moving for dismissal can demonstrate that the authorized agent of an appellant had actual notice of the decision and failed to file a notice of appeal within 30 days of the date of the such actual notice. See Nabesna Native Corp., Inc. (On Reconsideration), 83 IBLA 82 (1984).

Here, despite the fact the notice of appeal from the May 30 decision was not filed until September 10, 1985, we must deny MMS's motion. The case record prepared by MMS 3/ does not contain sufficient evidence to support the conclusion that the decision was served upon appellant in the manner required by 43 CFR 4.401(c), nor does it contain sufficient evidence to establish that appellant or the agent authorized by appellant to handle this matter had actual notice more than 30 days prior to the filing of the appeal.

Although MOEPSI is the appellant in both appeals, MOEPSI's interest arises because it has succeeded to the interests of TransOcean and Superior, each of which filed separate royalty refund requests. TransOcean's request for refund was originally filed on October 31, 1977, but MMS returned all documents relating to TransOcean's refund request with a letter dated July 29, 1983. MOEPSI resubmitted the TransOcean refund request by letter dated June 18, 1984. This letter, submitted by Robert J. Fritz, indicated that MOEPSI's address is 1250 Poydras Building, New Orleans, Louisiana 70113. No later document in the record establishes a different address of record for the TransOcean refund request. Nevertheless, the May 30, 1985, decision was addressed to Mr. Mike Wilkinson, Mobil TransOcean Company, 9 Greenway Plaza, Suite 2700, Houston, Texas 77046.

The Solicitor contends this was the correct address of record and explains that MMS maintains a computer data base record of lessees and payors and their respective addresses. The payors are required to notify MMS of any change of address so that the record can be updated. MMS relies on two documents to substantiate its claim that the decision was properly served. The first is a BLM "Action" dated January 26, 1981, approving Mobil's merger with TransOcean, but that document sets forth no address to serve as appellant's last address of record. The second document is merely a print-out of the address contained in MMS's data base. Neither document can logically lead us to conclude the appeal from the decision denying the TransOcean refund must be dismissed.

The last address of record to which 43 CFR 4.401(c) refers is the last address provided by the appellant. MMS points to no document provided

3/ Had the agency actually made or forwarded a proper record in this case, there should have been two nearly identical files, one for Superior and the other for TransOcean, the two original refund applicants. The currently constituted record on appeal is a single file consisting primarily of the parties' briefs.

by appellant establishing the Houston address as the last of record in the particular matter of the royalty refund request, although the request may originally have emanated from there in 1977. The Solicitor contends the resubmittal of the refund request on stationery bearing a New Orleans address was not sufficient to effect a change of address because no instruction was given to do so. However, we have no document originating from appellant in connection with its resubmittal of the refund request establishing the Houston address as the address of record; we do have a document originating from appellant providing the New Orleans address, to which an MMS official corresponded. We must conclude on the basis of the record provided in this appeal that the decision denying the TransOcean refund was not sent to the proper address of record.

We now turn to the denial of the Superior refund request. The May 30, 1985, decision letter was mailed to Superior Oil Company, Attention: R. M. Williams, Mobil Oil Corporation - MEPSI, P.O. Box 900, Dallas, Texas 75221. Appellant contends this letter should have been mailed to Superior's separate mailing address at P.O. Box 1521, Houston, Texas.

The Solicitor, however, refers to a letter received by MMS on January 9, 1985, from Superior requesting "all correspondence from the Minerals Management Service regarding Superior Oil's compliance efforts with the regulations promulgated and administered by the Minerals Management Service should be directed to" the same address to which the May 30 decision was sent. The letter further stated the request was "being made as a direct result of Mobil Oil Corporation's recent acquisition of Superior Oil." Given the all encompassing nature of this notification, MMS properly relied on it as establishing the address to which the May 30 decision was to be sent, despite the document's belated emergence into the administrative record of this proceeding. As explained above, the correct address of record should be immediately ascertainable by inspecting a chronologically sequenced case record transmitted with the appeal. If a case record has been assembled with a minimum degree of care, no further evidence of this kind should be necessary. Nevertheless, we hold this letter established Superior's last address of record, but we do not dismiss this appeal because the record does not establish that the May 30 decision was actually received -- or that appellant or its agent had actual notice of it -- more than 30 days prior to the filing to the notice of appeal. The fact these companies had been taken over by Mobil provided no basis for directing the letter to addresses other than the ones designated previously, in the absence of specific instructions to the contrary. See Victor M. Onet, Jr., 81 IBLA 144 (1984).

Although we find the May 30 decision did indicate the correct address of record with respect to the Superior refund request, it does not follow that this delivery would have satisfied the service requirement for a decision affecting the TransOcean request, contrary to the argument advanced by the Solicitor. The letter of notification dated January 9, 1985, was not filed by appellant, but by a stranger to the TransOcean matter, and thus was not competent to effect a change of address for that case. See Victor M. Onet Jr., supra. We also reject the Solicitor's general argument that service on MOEPSI can be accomplished by directing a letter to the parent office of Mobil. Under the applicable regulation, such service cannot substitute

for the requirement that correspondence be directed to the last address provided by an appellant with respect to a particular matter.

The filing of the motion to dismiss by MMS has, of necessity, directed our attention to the adequacy of the administrative record assembled by MMS in this appeal. Had records been maintained in a proper and systematic manner, this Board should have been able to resolve this motion in a manner which is free from doubt. However, the only matter that is here free from doubt is the fact that the case record is not complete. Even though documents such as certificates of service and those documents necessary to establish the proper address of record may be considered routine, they are not insignificant. They are absolutely necessary in determining this Board's jurisdiction, and they are missing from the file. It is odd that MMS would move to dismiss this appeal when the record MMS transmitted is devoid of the evidence necessary to sustain the motion.

The proper assembly of a case record should not be a difficult matter. However, the agency should not wait to begin this task until after a notice of appeal has been filed. It should start to assemble a file at the initiation of any process which might culminate in a decision subject to this Board's review. The first document placed in the record should be the one that initiates the process. In certain cases, this might be a notice from the agency, which should be placed in a file with any documents necessary to establish the basis for issuing the notice. Cases such as this, however, are initiated by an application by a member of the public, and a case file should be opened upon receipt of such a document. Any correspondence should be dated and included in the case file chronologically as it is issued or received, along with memoranda of meetings and telephone conversations. See NLRB v. West Texas Utilities Co., 214 F.2d 732, 737 (5th Cir. 1954). It may be necessary to add additional reports, plans, and other documents, depending on the type of case. The final documents added should be the decision and proof of service thereof. The record should be maintained in such a manner that when a notice of appeal is timely filed, the only task remaining is to add the notice to the record and transmit it immediately to this Board.

In any case, the administrative record transmitted to this Board must be complete. Once an appeal is filed, the Board makes the final decision for the Department. See 43 CFR 4.1; 4.21. It is the record before the Board which constitutes the record of the agency in deciding the matter. If an appellant were to seek judicial review of the Board's decision, a member of the Board would be required to certify, under oath, that the records before him constituted the agency's complete administrative record in the matter, and a court on judicial review could properly confine its attention to those particular documents. See 5 U.S.C. § 706 (1982).

The administrative record transmitted to this Board in this appeal is not complete, and it is therefore necessary for MMS to assemble a proper record. If it has documents as described in this opinion to support the motion to dismiss this appeal, they should be placed in the record. Any documents which MMS can properly add to the case file shall be served upon appellant in the manner required by 43 CFR 4.401.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, MMS's motion to dismiss the appeal is denied based upon the present record without prejudice and MMS is instructed to promptly assemble a proper case record in accordance with this opinion.

_____
Franklin D. Arness
Administrative Judge

We concur:

_____
Wm. Philip Horton
Chief Administrative Judge

_____
Will A. Irwin
Administrative Judge

March 31, 1987

| | | |
|---|---|---|
| IBLA 86-63 | : | MMS-85-0188-OCS |
| MOBIL OIL EXPLORATION AND PRODUCING SOUTHEAST, INC. | : | Refund Requests |
| | : | Reconsideration Granted; |
| | : | Appeal Dismissed; |
| | : | Appeal Affirmed as Modified |

ORDER

By decision dated May 30, 1985, the Director of the Minerals Management Service (MMS) denied requests for refunds filed by eight companies resulting from Federal Power Commission (FPC) Opinion No. 598, issued July 16, 1971, 36 FR 13915 (July 28, 1971). Mobil Oil Exploration and Producing Southeast, Inc. (MOEPSI) is the successor-in-interest to two of the eight companies, Superior Oil Company (Superior) and TransOcean Oil, Inc. (TransOcean).

By its decision MMS denied the refunds under FPC Opinion No. 598 "because the requests were filed outside of the 2-year time limit imposed by section 10 of the Outer Continental Shelf Lands Act" (OCSLA) 43 U.S.C. § 1339 (1982). The same statute was the basis for MMS's denial of refund requests filed following the vacation of Federal Energy Regulatory Commission (FERC) Orders Nos. 93 and 93-A in Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission, 716 F.2d 1 (D.C. Cir. 1983), cert. denied, 465 U.S. 1108 (1984). See 49 FR 47120 (Nov. 30, 1984). Because of the similarity of the legal issues raised concerning the statute, the appeals of MMS's May 30, 1985, decision arising under FPC Opinion Mo. 598 were consolidated with those arising from FERC orders Mos. 93 and 93-A. By decision dated March 17, 1987, in Shell Offshore, Inc., 96 IBLA 149, 94 I.D. ___ (1987), the Board disposed of pending appeals related to refund requests under FERC Orders Nos. 93 and 93-A. In this decision it was determined that because the appeals of MMS's decision of May 30, 1985, arose from different procedural and factual backgrounds and raised additional issues, they should be ruled upon by separate decisions.

By motion received November 7, 1985, MMS moved to dismiss MOEPSI's appeal for failure to file a timely notice of appeal as required by 43 CFR 4.411(a). Upon review of the case file, we determined that MMS's service of its decision upon TransOcean had not been proper because it had not been sent to the proper address of record. Mobil Oil Exploration and Producing Southeast, Inc., 90 IBLA 173, 176 (1986). We also found that service upon Superior had been made to the proper address, but we did not dismiss the
appeal because the record did not indicate that the decision had been



received, or that appellant had actual notice of the decision, more that 30 days prior to filing its notice of appeal. Id. Accordingly, we directed MMS to assemble a proper record for review.

By document received April 18, 1986, MMS moved for reconsideration of our decision on its motion to dismiss on the basis of newly submitted stipulation by the parties. A decision on the motion was delayed pending a decision in Shell Offshore, Inc., supra.

By their stipulation the parties agree that "Mobil Exploration and Producing Services Inc. ("MEPSI") received on June 6, 1985, a copy of the May 30, 1985 Director's Decision which is the subject

of this appeal." They further agree that the decision was delivered by regular mail to: Superior Oil Company/Attention: R.M. Williams/ Mobil Oil Corporation - MEPSI/ P.O. Box 900/ Dallas, Texas 75221.

The Board Accepts the stipulation of the parties and grants reconsideration of the appeal. Under the facts established by the stipulation, it is clear that the notice of appeal for Superior was filed more than 30 days after service of the decision upon the company. Accordingly, upon reconsideration, we find that the notice of appeal on behalf of Superior was not timely filed under 43 CFR 4.411(a), and the appeal of Superior is dismissed. See PRM Exploration Co., 90 IBLA 63, 67, 92 I.D. 617, 619 (1985), and cases cited therein.

MMS's findings in its decision of May 30, 1985 pertaining to the refund request of TransOcean are affirmed as modified. In its decision MMS stated:

> The file contains no copy of Mobil's initial refund request. From photocopies of documents filed with FERC, it appears that the request covers payment made from January 1962 to December 1970. In a letter to USGS dated June 13, 1978, Mobil states that the request was first filed on October 31, 1977, for $115,143.55. Even assuming this to have been the case, Mobil's refund request falls outside of the 2-year period. No supporting arguments have been submitted.
>
> Therefore Mobil's refund request is denied as it was filed outside the 2-year statute of limitations.

It is not clear what file MMS consulted when it made its decision. The file returned to us in response to our order contains a letter from TransOcean, dated October 31, 1977, and dated stamped as received November 3, 1977, requesting payment from the Geological Survey (the agency responsible for royalty management at the time). It is also unclear why MMS believed it could properly dispose of a refund request without having the request before it, but using instead information taken from FERC documents. Nevertheless, based on the file before us, we conclude that TransOcean's October 31, 1977, refund request for payments made from 1962 to 1970 was not filed within the two year period defined by section 1339. Shell Offshore, Inc., supra. On this basis we affirm the denial of the refund request for payments made by TransOcean.



Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal of the decision as to Superior Oil Company is dismissed and the decision appealed from as to TransOcean Oil, Inc. is affirmed as modified.

_____
Franklin D. Arness
Administrative Judge

I concur:

_____

Wm. Philip Horton
Chief Administrative Judge

APPEARANCES:

Robert W. Haines, Esq.
Mobil Oil Exploration & Producing Southeast, Inc.
1250 Poydras Street
New Orleans, Louisiana 70113

J. Berry St. John, Jr., Esq.
Liskow & Lewis
One Shell Square -- 50th Floor
New Orleans, Louisiana 70139-5099

Cass C. Butler, Esq.
Division of Energy and Resources
Office of the Solicitor
U.S. Department of the Interior
18th & C Streets, N.W., Room 6321
Washington, D.C. 20240

90 IBLA 178C